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IN THE

# Supreme Court of the United States

October Term, 1974

---

**No. .....**

---

BUILDING OWNERS & MANAGERS ASSOCIATION
OF METROPOLITAN DETROIT,
BOOK BUILDING CO.,
COMFORD INVESTMENT CO.,
FISHER NEW-CENTER CO.,
FORT STREET REALTY CO.,
GUARDIAN BUILDING CORPORATION,
WASHINGTON BOULEVARD BUILDINGS, INC.,
WINEMAN INVESTMENT CO.,

On behalf of themselves and all other users of Detroit Edison Company steam heat in the metropolitan Detroit area

CITY OF DETROIT,
COUNTY OF WAYNE,
ATTORNEY GENERAL OF THE
STATE OF MICHIGAN

*Petitioners,*

vs.

THE DETROIT EDISON COMPANY

and

MICHIGAN PUBLIC SERVICE COMMISSION

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioners pray that a writ of certiorari issue to review the Order of the Supreme Court of the State of Michigan entered on July 24, 1974.

## OPINIONS BELOW

The Opinion and Orders of the Ingham County Circuit Court of the State of Michigan, the Orders of the Court of Appeals of the State of Michigan and the Order of the Supreme Court of the State of Michigan are all unreported, but are attached to this application as Appendices A-E.

## JURISDICTION

The Ingham County Circuit Court's Opinion and Order Granting Plaintiffs' Motion for Summary Judgment in Part (Appendix A) is dated April 11, 1973 and was entered on that date.

The Ingham County Circuit Court's Opinion and Order Denying Plaintiffs' Motion for Supplemental Order (Appendix B) is dated January 11, 1974 and was entered on that date.

The Order of the Court of Appeals of the State of Michigan denying petitioners' Application for Leave to Appeal (Appendix C) is dated April 19, 1974 and was entered on that date.

The Order of the Court of Appeals of the State of Michigan dismissing petitioners' Claim of Appeal (Appendix D) is dated May 9, 1974 and was entered on that date.

The Order of the Supreme Court of the State of Michigan denying petitioners' Application for Leave to Appeal (Appendix E) is dated July 24, 1974 and was entered on that date.

Jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3), this being an appeal which draws into question rights claimed by petitioners under the Constitution of the United States.

## QUESTION PRESENTED

The state court made an express finding that an order of a state administrative agency permitting an increase in the

rates charged by a public utility to its consumers had been issued in violation of due process because the consumers had not been given prior notice of the hearings held on the rate increase request. The question presented is whether the state court making such a finding may then refuse to order an immediate refund of the rate increases collected under the invalid and unconstitutional agency order, may remand the proceeding to the agency for the introduction of petitioners' proofs several years after the initial rate determination and may allow the utility, during the pendency of the proceedings, to retain the consumers' property admittedly taken from the consumers without notice and in violation of due process.

Petitioners maintain that such action by a state court is repugnant to the due process guarantees of the Fourteenth Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

## STATEMENT

This is a civil class action brought by the consumers of steam power supplied by a public utility, seeking a refund of rate increases claimed to have been exacted in violation of their fundamental rights to due process of law guaranteed under the Fourteenth Amendment of the United States Constitution.

Plaintiff-petitioner Building Owners & Managers Association of Metropolitan Detroit is a Michigan non-profit corporation headquartered in the City of Detroit, some of whose members are commercial consumers of steam power.

Plaintiff-petitioners Book Building Co., a Michigan limited partnership; Comford Investment Co., a Michigan

co-partnership; Fisher-New Center Co., a Michigan corporation; Fort Street Realty, a Michigan co-partnership; Guardian Building Corporation, a Michigan corporation; Washington Boulevard Buildings, Inc., a Michigan corporation; and Wineman Investment Co., a Michigan corporation, are all commercial consumers of steam power in the Detroit area.

Plaintiff-petitioner City of Detroit is a Michigan municipal corporation and is a consumer of steam power.

Plaintiff-petitioner County of Wayne is a Michigan municipal corporation and is a consumer of steam power.

Plaintiff-petitioner Frank J. Kelley is the duly elected and qualified Attorney General of the State of Michigan and represents the State of Michigan, its departments, commissions and agencies as consumers of steam power.

Defendant-respondent Michigan Public Service Commission is an administrative agency of the State of Michigan, created by the provisions of Act 3 of the Michigan Public Acts of 1939, as amended (Michigan Compiled Laws § 460.1 et seq; Michigan Statutes Annotated § 22.13(1) et seq) and having state statutory jurisdiction, authority and a duty to regulate public utilities within the State of Michigan.

Defendant-respondent The Detroit Edison Company is a Michigan and a New York corporation supplying various forms of energy to consumers in the metropolitan Detroit area. It is a public utility subject to rate and other regulation by respondent Michigan Public Service Commission and is the sole supplier of the steam power at issue in the instant case.

On May 7, 1970 respondent The Detroit Edison Company filed an application with respondent Michigan Public Service Commission seeking to increase rates covering the supply of steam power to approximately 1200 steam customers in the Detroit area (Michigan Public Service Commission case No. U-3678). Among the customers of Detroit Edison affected by the application were the petitioners herein, as

well as other numerous downtown and midtown Detroit building owners. (See Appendix A)

The only notification of the rate increase application pending before respondent Michigan Public Service Commission or of the hearings scheduled to be held thereon was a single letter sent to petitioner City of Detroit by respondent Michigan Public Service Commission. (See Appendix A)

On September 21, 1970, following a hearing participated in by respondents Michigan Public Service Commission and The Detroit Edison Company, respondent Michigan Public Service Commission issued its order authorizing respondent The Detroit Edison Company to increase its steam rates, effective on and after September 21, 1970, in approximately the amount requested, to wit, $2.8 million annually. None of the petitioners herein attended or participated in the aforementioned rate hearing.

On October 19, 1970 petitioners commenced this class action in the Ingham County Circuit Court for the State of Michigan seeking to invalidate the September 21, 1970 Michigan Public Service Commission order in case no. U-3678, alleging that the notice of hearing issued by respondents Michigan Public Service Commission and The Detroit Edison Company was not reasonably calculated to advise or inform respondent The Detroit Edison Company's steam customers of the pendency of a rate case which would substantially affect their interests.

On February 4, 1972, after preliminary proceedings in the Ingham County Circuit Court and after an unsuccessful interlocutory appeal to the Court of Appeals of the State of Michigan by respondent The Detroit Edison Company, petitioners filed a Motion for Summary Judgment, claiming that respondents' failure to give notice to petitioners rendered the steam rate order null and void. Petitioners also sought an immediate prohibition against further collection by respondent The Detroit Edison Company of monies pursuant to the respondent Michigan Public Service Commission's order in case no. U-3678 and sought a refund of all

sums theretofore collected by respondent The Detroit Edison Company pursuant to said order. In their brief in support of said motion, petitioners maintained that their principle contention in the case was that the notice sent by respondent Michigan Public Service Commission did not satisfy the requirements of fundamental due process as guaranteed by the United States Constitution.

On April 11, 1973 the Ingham County Circuit Court granted petitioners' Motion, in part, finding that respondents Michigan Public Service Commission and The Detroit Edison Company had in fact failed to provide petitioners with adequate notice of the steam power rate increase application and hearing thereon. The court held that the notice sent solely to the City of Detroit failed to satisfy the requirements of fundamental due process, as guaranteed by the United States Constitution and the Constitution of the State of Michigan. (See Appendix A)

On April 11, 1973 the Ingham County Circuit Court also remanded the matter to respondent Michigan Public Service Commission for the purpose of giving adequate notice to individual users of steam power and for the taking of further evidence and possible redetermination of the rates established by said respondent in its September 21, 1970 order. However, the court allowed the challenged rate increases to continue in effect.

On April 26, 1973 appellants filed a motion for rehearing entitled "Motion for Supplemental Order" requesting that the court (a) declare the September 21, 1970 order of respondent Michigan Public Service Commission reversed, set aside and held for naught and (b) order respondent The Detroit Edison Company to immediately refund all sums collected by it pursuant to said order.

On January 11, 1974 the Ingham County Circuit Court denied petitioners' Motion for Supplemental Order and refused to direct the requested refund. Respondent The Detroit Edison Company was ordered to post a $10 million bond and the case was remanded. (See Appendix B)

On January 30, 1974 petitioners filed a claim of appeal to the Court of Appeals of the State of Michigan and on March 4, 1974 petitioners filed an application for leave to appeal with the Court of Appeals of the State of Michigan. In both their claim of appeal and application for leave to appeal petitioners sought to have the Court of Appeals review the April 11, 1973 and January 11, 1974 Orders of the Ingham County Circuit Court on the grounds that the appealed steam rate order of respondent Michigan Public Service Commission found by the Circuit Court to have been issued in violation of due process of law was null and void, and accordingly, the retention of monies illegally collected thereunder by respondent The Detroit Edison Company presented a continuing violation of petitioners' due process rights.

On April 19, 1974 the Court of Appeals of the State of Michigan denied petitioners' application for leave to appeal. On May 9, 1974 the Court of Appeals for the State of Michigan dismissed petitioners' claim of appeal. (See Appendices C and D)

On May 10, 1974 the petitioners herein filed an application for leave to appeal before the Supreme Court of the State of Michigan. On July 24, 1974 the application for leave was denied. (See Appendix E)

## REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment of the United States Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

The notice requirement at issue in the instant case is an inviolate Fourteenth Amendment due process right:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give

additional weight; . . ." *Roller* v. *Holly*, 176 US 398, 409 (1900)

The Ingham County Circuit Court correctly adhered to the precedents of the United States Supreme Court when it found, in its Opinion Granting Plaintiffs' Motion for Summary Judgment in Part (Appendix A), that respondents had violated the precepts of fundamental due process by issuing and implementing a utility rate-increase order after proceedings of which petitioners had no notice or opportunity to participate. However, the circuit court ignored the decisions of the United States Supreme Court hereinafter set forth when it refused to reverse and vacate the invalid order (Appendices A and B). The remand directed by the circuit court cannot cure the constitutionally defective rate order and further represents a continuing violation of petitioners' due process rights. Both the Michigan Court of Appeals and the Michigan Supreme Court have refused to grant petitioners a hearing to cure this Constitutional defect (Appendices C, D and E). Accordingly, this Court should grant review.

## 1. AN ORDER ENTERED WITHOUT NOTICE TO INTERESTED PARTIES, BEING IN VIOLATION OF FUNDAMENTAL DUE PROCESS, IS VOID.

Under the Fourteenth Amendment it is a well established proposition that no one can be personally bound by a decree in a case in which he neither appeared nor was served nor effectively made a party. Such an absence betokens a lack of jurisdiction and voids a decree entered in such defective proceedings. *Hanson* v. *Denckla*, 357 US 235 (1958).

In *Armstrong* v. *Manzo*, 380 US 545 (1965), the Supreme Court held that an adoption decree entered without notice to the natural father of an adopted child was *void*, of no effect, and incapable of being sanitized through a "remand" for additional testimony by the protesting father.

Similarly, in *United Gas Co.* v. *Mobile Gas Corporation*, 350 US 332 (1956), the Supreme Court held that where the Federal Power Commission erroneously permitted increased gas rates to go into effect, the new schedule filed by the gas company was a *nullity* insofar as it purported to change the existing rate.

In *Roller* v. *Holly, supra*, after finding there to be inadequate notice to a defendant in an action for judgment on certain promissory notes, the Supreme Court reversed the judgment of the Court in Civil Appeals which had affirmed the judgment of the local district court, on the grounds *"that the judgment obtained upon such notice was not binding upon the defendant"* (176 US at 413) (emphasis supplied). Likewise, in *McDonald* v. *Mabee*, 243 US 90 (1917), the Supreme Court maintained that judicial orders entered in proceedings where there has been defective service are *totally void:*

> ". . . an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it . . ." (243 US at 92)

See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306 (1950).

Accordingly, in the case at hand, it was incumbent upon the Ingham County Circuit Court to hold the steam rate order not binding upon the petitioners after the court had determined that the notice given to petitioners was inadequate. The court's failure to so hold enables respondent The Detroit Edison Company to retain petitioners' property following a judicial declaration that the property had been exacted in contravention of fundamental due process guarantees. Respondent The Detroit Edison Company is entitled to retain only those amounts which it was permitted to charge under the last *valid* rate order i.e. that which immediately preceded the order in rate case

U-3678. The rates in excess thereof, sanctioned by the order found to have been issued in violation of due process, should have been refunded.

## 2. A REFUND NEED NOT BE EXPRESSLY STATUTORILY PROVIDED BEFORE BEING GRANTED BY A COURT AS A MEANS OF RETURNING PROPERTY TAKEN IN VIOLATION OF DUE PROCESS.

Respondents heretofore have pointed to the failure of Michigan statutes regulating public utilities to expressly provide for a refund of illegally exacted rates as justification for respondent The Detroit Edison Company's retention of sums collected herein. The United States Supreme Court has held that a state agency, even in the absence of specific legislative enactments, is required to refund money collected in derogation of Constitutional requirements, and the courts will imply a refund procedure where none is statutorily provided. To hold otherwise would be in contravention of the Fourteenth Amendment. *Ward* v. *Board of County Commissioners of Love County, Oklahoma*, 253 US 17 (1920).

In the *Ward* case, a group of Indians brought suit in federal court seeking a refund of property taxes which had been levied against their land and collected. An Act of Congress had declared the original land grants exempt from taxation for a period of 21 years. Ten years later, Congress removed the exemption; however, this Court then held that Congress could not Constitutionally deprive the Indians of their exemptions within the 21 year period. Nonetheless, and in the face of the Supreme Court decision, the defendant county continued to levy and collect property taxes on Indian lands. The Supreme Court directed the county to cease collecting the taxes and held that there was a *Constitutional right to a refund.*

> "As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It

> is a well-settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute, will compel restitution of compensation'. (Citations are omitted) *To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.*" 253 US 17, 24 (emphasis added)

In the present case, for the circuit court to declare that a rate order was issued without authority and in derogation of Constitutional rights, and at the same time allow respondent The Detroit Edison Company to keep sums collected under that invalid order, "is nothing short of saying that it (the respondents) could take or appropriate the property . . . (of the petitioners) arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment . . ." 253 US 17, 24 (parenthetical material added).

In *Baltimore & Ohio R. Co.* v. *United States,* 279 US 781 (1929), the Supreme Court had earlier reversed a decree of a three judge district court panel which had erroneously refused to vacate an order of the Interstate Commerce Commission by which the east side railroads had been required to absorb transfer charges on certain traffic moving west at St. Louis, Missouri. Subsequently, an east side railroad had applied to the district court for a decree in accordance with the Supreme Court mandate and restoration by the west side railroads of the amounts which the east side railroad had borne and paid under the order

because of the erroneous decree. On remand, the district court reversed its earlier decree and set aside the Commission's order, but refused to grant restitution. On appeal, the Supreme Court reversed, stating:

> *"The east side roads are entitled to restitution. The order should have been set aside in the first instance. . . .*
>
> "The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done. *Northwestern Fuel Co.* v. *Brock,* 139 US 216, 219. *Arkadelphia Co.* v. *St. Louis, S.W.R. Co., supra,* 145. *Ex Parte Lincoln Gas Co.,* 256 US 512, 516 (sic). *When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order. . . .*
>
> *". . . It was the duty of the court to retain jurisdiction of the case, enter a decree that appellants are entitled to restitution, and refer the case to a master as prayed in appellants' motion. Ex Parte Lincoln Gas Co., supra,* 517." 279 US at 785-786 (emphasis added).

Restitution means restoration, and it requires that respondent The Detroit Edison Company restore what the petitioners have lost because of the failure of the Commission to enter a valid order in the first instance. *Baltimore & Ohio R. Co.* v. *United States, supra; Ex Parte Lincoln Gas & El. Co.,* 257 US 6 (1921); *Arkadelphia Mill Co.* v. *St. Louis S.W.R. Co.,* 249 US 134 (1919); and *Northwestern Fuel Co.* v. *Brock,* 139 US 216 (1891).

### 3. PROPERTY TAKEN IN VIOLATION OF DUE PROCESS MAY NOT BE RETAINED, NOTWITHSTANDING THE FACT THAT DUE PROCESS MIGHT OTHERWISE HAVE YIELDED THE SAME RESULT.

Respondent The Detroit Edison Company has urged that despite the alleged insufficiency of notice of the rate hearing, the rates determined thereat have yet to be shown to be substantively unreasonable. By virtue of its remand and concomitant preservation of the rate structure established by the challenged administrative order, the Ingham County Circuit Court espoused this argument that property taken in violation of due process rights may be retained where due process might otherwise have led to the same result. Such reasoning was rejected by the Supreme Court in *Coe* v. *Armour Fertilizer Works,* 237 US 413 (1915). There, it was held that a person is not precluded from complaining that the taking of his property was without the notice and hearing essential under the due process clause of the Fourteenth Amendment because, in his particular case, due process of law would lead to the same result because he had no adequate defense on the merits. A writ of execution issued without notice to the petitioner in that case was quashed immediately, rather than requiring petitioner to sustain his defense on the merits with respect to the underlying claim against him.

In this same vein, the Supreme Court in *Sniadach* v. *Family Finance Corporation of Bay View,* 395 US 337 (1969) voided a prejudgment garnishment issued without notice, on the grounds that it violated fundamental requirements of due process. In so doing, the Court rejected the argument that due process guarantees are somehow preserved by the circumstance of a later trial on the merits:

> "They (the garnisheed wages) may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim, the wage earner is deprived of his enjoyment of

> earned wages without any opportunity to be heard and to tender any defense he may have . . ." 395 US at 339 (parenthetical materials added).

In dismissing the argument that the subsequent trial on the merits will somehow ex post facto cure the prior due process violation in the form of inadequate notice, the Supreme Court repeated in *Sniadach* its earlier rule in *Mullane* v. *Central Hanover Bank & Trust Co., supra,* that the right to be heard, "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest" (395 US at 339).

The Court reaffirmed its *Sniadach* holding in *Fuentes* v. *Shevin,* 407 US 67 (1972), where it maintained that from the standpoint of the application of the due process clause it is immaterial that the deprivation may be temporary and non-final pending a hearing on the merits. Similarly, in *Bell* v. *Burson,* 402 US 513 (1971) at 542 the Supreme Court again stressed that due process rights to a hearing are meaningful only if the hearing occurs *before* any substantive administrative action is taken.

In the instant case, respondent Michigan Public Service Commission's granting of a rate increase order to respondent The Detroit Edison Company and the circuit court's allowance of the implementation of that rate order during the period *before* petitioners' hearing thereon, contravene the rule of *Bell* v. *Burson, ibid.* and represent a continuing violation of petitioners' due process rights.

## 4. AN ADMINISTRATIVE ORDER ENTERED WITHOUT NOTICE TO INTERESTED PARTIES SUFFERS THE SAME CONSTITUTIONAL INFIRMITY AS A JUDICIAL DECREE ENTERED WITHOUT NOTICE.

It cannot be argued that because the rate hearing in the instant case was an administrative rather than a judicial proceeding, the due process violations, in the form of inade-

quate notice and lack of hearing, do not per se void the administrative order. *Bell* v. *Burson, ibid.* involved state administrative proceedings. So too did *Londoner* v. *City and County of Denver,* 210 US 373 (1908). In the latter case, a municipal board of equalization issued special assessments to benefited property owners for already-completed street improvements, having afforded the property owners the opportunity to file written objections to the assessments but denying them an opportunity for a hearing on said assessments. The Supreme Court, having determined that fundamental due process requires a hearing *prior* to the issuance of such an administrative order (assessment), *voided* the assessments and specified that the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of the void assessments. So too, in the instant case, should the Ingham County Circuit Court have remedied the admitted due process violation by *voiding* the defective rate order and *refunding* the sums collected thereunder.

## 5. A REMAND WHICH WRONGFULLY SHIFTS THE BURDEN OF PROOF TO PETITIONERS AND FORCES PETITIONERS TO REBUT EVIDENCE ENTERED IN THEIR ABSENCE AT AN EARLIER PROCEEDING OF WHICH THEY HAD NO NOTICE, IS ITSELF CONSTITUTIONALLY DEFECTIVE.

Notwithstanding the foregoing cases, which clearly establish that the order of respondent Michigan Public Service Commission was void and that rate increases exacted from petitioners in reliance thereon should be returned, examination of the consequences of the circuit court's remand order betrays its inherent repugnance to petitioners' due process rights and illustrates why certiorari should be granted.

The case has been ordered back to respondent Michigan Public Service Commission for the giving of notice to petitioners and to enable petitioners to introduce their own

proofs on the rate question. The challenged rate order continues to be operative in the interim. Furthermore, the proofs and testimony heretofore introduced by respondent The Detroit Edison Company continue to be a part of the administrative record, and it becomes petitioners' burden to rebut the case entered in their absence. The violation of due process inherent in such a remand is that petitioners, already having been denied the opportunity to cross-examine respondents' witnesses and challenge the admissibility of respondents' exhibits, now have the burden of proof shifted to them. Petitioners are required to come forward and introduce evidence satisfactory to rebut a rate determination made in their absence and continuing in effect.

In *Armstrong* v. *Manzo, supra,* this technique of having an additional hearing to allow a petitioner to introduce his proofs as a means of curing the Constitutional defect of failing to provide the petitioner with notice of the original hearing affecting his rights, was expressly rejected by the Supreme Court. Pointing out that such an approach wrongfully shifted the burden of proof and forced the petitioner to overturn an order made in his absence, the Supreme Court held that the only proper remedy was to have the original court order *vacated:*

> "A fundamental requirement of due process is 'the opportunity to be heard'. *Grannis* v. *Orden,* 234 US 385, 394, 34 S.Ct 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." 380 US at 552

## CONCLUSION

Petitioners pray that, in accordance with the decisions of the Supreme Court set forth above, the writ of certiorari be granted, the decisions of the lower courts be reversed, and respondent the Detroit Edison Company be ordered to immediately refund all steam rate increases collected pursuant to the invalid and unconstitutional September 21, 1970 steam rate increase order of respondent Michigan Public Service Commission.

Alternatively, petitioners pray that the writ of certiorari be granted and the case be set for hearing before this Court.

Respectfully submitted,

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## APPENDIX A

STATE OF MICHIGAN
In the Circuit Court for the County of Ingham

| | |
|---|---|
| BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al., *Plaintiffs,* vs. MICHIGAN PUBLIC SERVICE COMMISSION, et al., *Defendants.* | Docket No. 12410-C<br>Opinion and Order Granting Plaintiffs' Motion for Summary Judgment in Part |

At a session of said Court held in the Circuit Court-rooms, City of Lansing, County of Ingham, State of Michigan, on the 11th day of April, A.D. 1973.

PRESENT: HONORABLE RAY C. HOTCHKISS, Circuit Judge.

Upon the Motion of Building Owners & Managers Association of Metropolitan Detroit for Summary Judgment;

The Court having reviewed the pleadings, heard argument in open Court and being cognizant of the memoranda of law of the respective parties, is of the opinion that Building Owners & Managers Association of Metropolitan Detroit's Motion for Summary Judgment should be and the same is hereby granted in part.

There can be no contention that the Public Service Commission does not have authority and jurisdiction in this matter since MCLA 460.6 explicitly states:

> The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally

> owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities . . .

The principal issue present in this action is whether notice of the Detroit Edison Company's pending steam rate increase application sent by the Defendant Michigan Public Service Commission solely to the City of Detroit satisfied the requirements of MCLA 460.6a or of fundamental due process, as guaranteed by the United States and Michigan Constitutions. It is the opinion of this Court that that question must be answered in the negative.

MCLA 460.6a by its own wording requires that more adequate notice be given then was given here:

> When any finding or order is sought by any gas, telephone or electric utility to increase its rates and charges or to alter, change or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected.

Defendant Michigan Public Service Commission seeks to distinguish this situation by contending that since a steam rate increase is not specifically mentioned, then the statute cannot have any affect in that area. However, MCLA 460.54, which refers to the Public Utilities Commission, which was abolished in 1939 and its functions transferred to the Michigan Public Service Commission pursuant to MCLA 460.4, states the following:

> In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing

> of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use.

It is, therefore, clear that the legislature did not intend to exclude utilities furnishing steam from the Public Service Commission's jurisdiction. The law does not favor repeals by implication and whether or not there has been such a repeal in a given instance rests on the legislative intent. *Northville Coach Line* v. *City of Detroit,* 379 Mich 317 (1967), *Yarger* v. *City of Hastings,* 375 Mich 413 (1965).

Defendant Commission also contends that since rate-making is of its very nature a legislative function there can be no constitutional due process requirement that rate-payers receive notice of hearings amending utility rates. However, this argument ignores the fact that the legislature has delegated the rate-making authority as regards all utilities to the Michigan Public Service Commission except for those that are municipally owned. See MCLA 460.6, *supra.* This delegation of authority to the Public Service Commission charges the Commission with the "duty of considering testimony offered by the parties, determining facts therefrom, and drawing legitimate inferences from the facts found to be established by competent proofs," *Shaw* v. *General Motors Corp.,* 320 Mich. 338, 345 (1948). "Fact-finding powers will always be labeled quasi-judicial". Institute of Continuing Legal Education, *The New Michigan Administrative Procedures Course Handbook* (1970), p. 26; *Argo Oil Corporation* v. *Atwood,* 274 Mich 47 (1935); *In re Brewster Street Housing Site,* 291 Mich 313 (1939), and as such the

> Agencies and administrative boards may not, in the exercise of quasi-judicial powers, act ex parte or in a peremptory manner. The limited nature of judicial review of administrative rulings imposes upon the agencies the requirement of compliance with present notions of procedural due process.

Institute of Continuing Legal Education, *supra, Milford* v. *People's Community Hospital Authority,* 380 Mich 49 (1968).

Having established that procedural due process is a necessary ingredient in a quasi-judicial proceeding, it becomes necessary to inquire as to what constitutes procedural due process. In *Dation* v. *Ford Motor Co.,* 314 Mich 152, 163 (1946), the Michigan Supreme Court stated:

> The words "due process of law" when applied to judicial proceedings mean a course of legal conduct consonant with rules and principles established in our system of jurisprudence for the protection and enforcement of private rights. Due process requires notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case, and the right of appeal from review of a decision regarded by a litigant as unjust.

The United States Supreme Court has spoken out on this issue in *Morgan* v. *United States,* 304 US 1, 22 (1937), where Chief Justice Hughes wrote:

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

Having determined that notice is a requirement of procedural due process in a quasi-judicial proceeding, the next question which arises is whether the notice given by

the Public Service Commission in a letter sent to the City of Detroit apprising the City of the pending application or of the hearings was such adequate notice as to satisfy the fundamentals of due process. The leading case in this area is *Mullane* v. *Central Hanover B. & T. Co.*, 339 US 306 (1949). That case involved the question whether notice by publication was constitutionally sufficient notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. In answering this issue in the negative, the United States Supreme Court said at page 314:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citing cases). The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean*, 234 US 385, 58 L ed 1363, 34 S Ct 779, *supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly*, 176 US 398, 44 L ed 520, 20 S Ct 410, *supra*, and cf. *Goodrich* v. *Ferris*, 214 US 71, 53 L ed 914, 29 S Ct 580.
>
> ***
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

The Michigan case of *Alan* v. *Wayne County,* 388 Mich 210 (1972), which involved the question of whether valid notice had been given under a section of the Revenue Bond Act (MCLA 141.133) in the ratification of stadium bonds, held at page 350:

> We do not hold that due process requires personal notification of every taxpayer, nor do we hold that there must be any mailed notice or *personal* notice to everyone. *Mullane* holds only that the method of notice chosen must give reasonable assurance of actually giving notice in light of other available means:
>
> "The statutory notice to known beneficiaries is inadequate, *not because it in fact fails to reach everyone,* but because *under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.*" Mullane, 319. (Emphasis added.)
>
> The kind of notice required depends on the circumstances of the case and the availability of other means in both a theoretical and economic sense.

Applying this rationale to the instant case, the Court is of the opinion that notice sent merely to the City of Detroit is not adequate notice and is not a method of notice which gives "reasonable assurance of actually giving notice in light of other available means", *Alan* v. *Wayne County, supra.* Methods such as including printed notice with or stamped notice on the bills sent out by the utility are not inconsistent with the reasoning of *Mullane* or *Alan.* The Court is not ordering that notice must be given in the above-stated manner but is only illustrating the methods available which are easily adoptable and economical.

Now Therefore, IT IS ORDERED, that this matter be remanded to the Michigan Public Service Commission for the purpose of giving adequate notice to individual users consistent with the rulings of this Court.

IT IS FURTHER ORDERED, that no action be taken as to the issue of whether the Public Service Commission findings were reasonable as to the steam rates increase until such time as the Commission has taken further evidence as submitted by the Plaintiff parties or other interested parties and redetermined such rates if deemed appropriate.

RAY C. HOTCHKISS

Ray C. Hotchkiss, Circuit Judge

## APPENDIX B

STATE OF MICHIGAN

In the Circuit Court for the County of Ingham

| | |
|---|---|
| BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al., *Plaintiffs,* vs. MICHIGAN PUBLIC SERVICE COMMISSION, et al., *Defendants.* | Docket No. 12410-C<br>Opinion and Order Denying Plaintiffs' Motion for Supplemental Order |

At a session of said Court held in the Circuit Court-rooms, City of Lansing, County of Ingham, State of Michigan, on the 11th day of January, A.D. 1974.

PRESENT: HON. RAY C. HOTCHKISS, CIRCUIT JUDGE

Upon the Motion of the Plaintiffs for Supplemental Order;

The Court having heard argument in open Court and being cognizant of the briefs of the respective parties is of the opinion that Plaintiffs' Motion for Supplemental Order should be and the same is hereby denied.

This Court's Opinion, rendered April 11, 1973, made no determination as to whether the steam rates granted to Detroit Edison by the Michigan Public Service Commission on September 21, 1970, were unreasonable or confiscatory. The only determination made was that proper notice of the application to increase steam rates must be given to those customers of Detroit Edison. The remand to the Public Service Commission was for the purpose of giving the no-

tice required and then having a subsequent hearing as to whether the rates granted in 1970 were excessive or not taking into consideration any evidence that existed at the time of the original rate hearings which any interested party may wish to submit.

The Court's authority for denying the motion is *Michigan Consolidated Gas Company* v. *Michigan Public Service Commission,* 389 Mich 624, 1973. In this case Ingham County Circuit Judge's decision to remand an appealed rate order to the Public Service Commission for reconsideration while issuing a temporary injunction granting a rate increase over and above that authorized by the Commission, subject to possible refund, was upheld by the Supreme Court of Michigan.

The Supreme Court sustained the action of the Circuit Court stating at page 640:

> Since rates cannot be made to operate retroactively, the best method of preserving the rights of all parties, a case for unreasonable action by the commission having been made out, is the device of a temporary injunction.

In the present case there exists no need to show that the commission acted unreasonably, all the Defendant asks is that the rates previously determined by the Commission be held in effect until such time as the rehearing, with proper notice given, takes place. If the Commission then finds that its order of September 21, 1970, was excessive, it can then make a determination as to what the rates should have been. This Court retains jurisdiction to determine the manner of refunding, if any is deemed necessary, along with the interest rate to be charged. In order to assure the customers of Detroit Edison their refund if the rates are found to be excessive, the Court will require Detroit Edison to post a bond in the amount of Ten Million Dollars ($10,000,000.00). Under the reasoning of the *Michigan Con-*

*solidated Gas Company* case, the Court has no other alternative but to require the posting of such a bond.

Now Therefore,

IT IS ORDERED that the Plaintiffs Motion for Supplemental Order should be and is hereby denied.

IT IS FURTHER ORDERED that the Defendant Detroit Edison post a bond in the amount of Ten Million Dollars ($10,000,000.00) to insure the refund of any excessive steam rates the Public Service Commission may determine in its rehearing. Such bond to be posted within twenty (20) days of the entry of this Opinion and Order.

RAY C. HOTCHKISS

RAY C. HOTCHKISS, Circuit Judge

## APPENDIX C

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the nineteenth day of April in the year of our Lord one thousand nine hundred and seventy-four.

BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al.,
*Plaintiffs-Appellants,*

vs.

MICHIGAN PUBLIC SERVICE COMMISSION,
*Defendant-Appellee,*

and

DETROIT EDISON COMPANY,
*Intervening Defendant-Appellee.*

Present the Honorable

Thomas M. Burns
Presiding Judge

Glen S. Allen, Jr.
Wade Van Valkenburg
Judges

No. 19724 L.C. # 12410-C

In this cause an application for leave to appeal is filed by plaintiffs-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for failure to persuade the Court of the need for immediate appellate review.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court

in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 23rd day of April in the year of our Lord one thousand nine hundred and seventy-four.

RONALD L. DZIERBICKI

Clerk

## APPENDIX D

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 9th day of May in the year of our Lord one thousand nine hundred and seventy-four.

BUILDING OWNERS & MANAGERS ASSOC. OF METROPOLITAN DETROIT, a Michigan nonprofit corp., BOOK BUILDING CO., a Michigan limited partnership, et al,

*Plaintiffs-Appellants,*

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

*Defendant-Appellee Cross-Apellant,*

and

DETROIT EDISON COMPANY

*Intervening Defendant-Appellee.*

Present the Honorable

Robert J. Danhof
Presiding Judge

Timothy Quinn
S. Jerome Bronson
Judges

No. 19370
L.C. No. 12410-C

In this cause intervening defendant-appellee has filed a motion to dismiss the appeal, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the appeal and cross-appeals be, and they are hereby, DISMISSED for lack of jurisdiction for the reasons that the orders of the circuit court sought to be appealed do not constitute a final judgment.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 9th day of May in the year of our Lord one thousand nine hundred and seventy-four.

RONALD L. DZIERBICKI

Clerk

## APPENDIX E

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, *Held* at the Supreme Court Room, in the City of Lansing, on the 24th day of July in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable THOMAS M. KAVANAGH, Chief Justice, THOMAS G. KAVANAGH, JOHN B. SWAINSON, G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, Associate Justices.

CR 13-63

BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al,
*Plaintiffs-Appellants,*

v.

55959

MICHIGAN PUBLIC SERVICE COMMISSION,
*Defendant-Appellee,*

and

DETROIT EDISON COMPANY,
*Defendant-Appellee.*

Present the Honorable

THOMAS M. KAVANAGH,
Chief Justice,

THOMAS G. KAVANAGH,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,

Associate Justices

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellants have failed to persuade the Court that the question presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 24th day of July in the year of our Lord one thousand nine hundred and seventy-four.

DONALD F. WINTERS

Clerk

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-467

BUILDING OWNERS & MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, BOOK BUILDING CO., COMFORD INVESTMENT CO., FISHER NEW-CENTER CO., FORT STREET REALTY CO., GUARDIAN BUILDING CORPORATION, WASHINGTON BOULEVARD BUILDINGS, INC., WINEMAN INVESTMENT CO.,

On behalf of themselves and all other users of DETROIT EDISON COMPANY steam heat in the metropolitan Detroit area

CITY OF DETROIT, COUNTY OF WAYNE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Petitioners,

vs.

THE DETROIT EDISON COMPANY and MICHIGAN PUBLIC SERVICE COMMISSION,

Respondents.

## REPLY OF RESPONDENT THE DETROIT EDISON COMPANY TO PETITION FOR WRIT OF CERTIORARI

### JURISDICTION

The Detroit Edison Company denies that this Court has jurisdiction under 28 USC § 1257 (3) for the reasons set forth *infra*.

## QUESTION PRESENTED

The Circuit Court for Ingham County granted Petitioners' motion for partial summary judgment holding that proceedings resulting in an order of the Michigan Public Service Commission allowing an increase in the steam rates charged by Respondent The Detroit Edison Company must be remanded to the Commission for new hearings because *certain of* the petitioners did not have adequate notice of the hearing.[1] The Court reached this decision in the face of Respondent's argument that the matter involved was legislative in character and hence no notice was required.

The question now presented here is whether, on the face of the record *at that point,* the Court was constitutionally required to order a refund of monies collected by Respondent Edison under the challenged rates where the only determination made supports the reasonableness of the rates and the only error claimed was the failure of the Michigan Public Service Commission to give certain of the petitioners adequate notice of the hearing.

## COUNTER-STATEMENT OF THE CASE

On May 7, 1970, Respondent The Detroit Edison Company filed an application with Respondent Michigan Public Service Commission seeking to increase rates covering the supply of steam to approximately 1,200 steam custo-

[1] It is undisputed that Petitioner The City of Detroit had notice of the hearing by virtue of a letter sent to it by the Commission under MCLA §460.1. The City elected not to take part in the hearing.

mers in the downtown and midtown Detroit area (Michigan Public Service Commission Case No. U-3678). Among the customers of Detroit Edison affected by the application were the governmental bodies of the City of Detroit, County of Wayne, State of Michigan and United States as well as the Wayne State University and numerous downtown and midtown building owners.

The Commission fixed the initial hearing date of September 1, 1970, and pursuant to its historical practice and custom, mailed its Notice of Hearing dated August 21, 1970, to the City of Detroit, one of the Petitioners herein. The only other Notice of Hearing sent by the Commission was to The Detroit Edison Company.

On August 5, 1970, the attorney for The Detroit Edison Company sent a copy of the application to the Assistant Corporation Counsel for the City of Detroit, and also advised him that the initial hearing date was September 1, 1970. On August 19, 1970, counsel for Edison had delivered to Detroit's Assistant Corporation Counsel a copy of the proposed rate schedules involved.

Hearings on the application were held before the Commission on September 1, 3 and 11, 1970. The City of Detroit did not file an Appearance nor participate in the proceedings. Cadillac Overall Supply Company petitioned for intervention, said petition was consented to by Respondent Edison herein and the Respondent Commission granted the petition. Cadillac participated in the proceedings. Representatives of North American Rockwell Corporation, Revere Copper and Brass Company and Anaconda Brass Company appeared at the hearings and made statements. As Assistant Attorney General of the State of Michigan participated on behalf of the Commission

Staff in these hearings and on its behalf consented to the reasonableness of the rates.

On September 21, 1970, Building Owners & Managers Association of Metropolitan Detroit (BOMA), one of the Petitioners herein, filed its delayed petition for intervention and rehearing and its petition was denied by the Commission that day. Respondent Edison was not notified of Petitioner's request for intervention until the day after it had been filed and denied.

On September 21, 1970, the Commission issued its order authorizing The Detroit Edison Company to increase its steam rates effective on and after September 21, 1970, in the amount requested by The Detroit Edison Company, which was approximately $2.8 million annually.

On October 19, 1970, petitioner, Building Owners & Managers Association of Metropolitan Detroit (BOMA), along with other petitioners herein (six private corporations or partnerships that owned or operated buildings that received steam service from The Detroit Edison Company), commenced an action in the Ingham County Circuit Court appealing from the September 21, 1970, Commission order. In the complaint it was prayed that

> "A. Defendant answer this complaint, answer under oath being expressly waived.
>
> B. An order be entered finding and determining that the aforesaid steam rates are unlawful and unreasonable and that the order be vacated.
>
> C. *An order be entered finding and determining that Defendant's order denying Association's Delayed Petition for Intervention and Rehearing was improper.* (Emphasis supplied.)

D. This honorable court permanently enjoin Defendant from enforcing said order.

E. This honorable court grant Plaintiffs such additional relief as shall be just and equitable."

On November 13, 1970, pursuant to a stipulation between Petitioners herein and Respondent Commission, Respondent The Detroit Edison Company was ordered to be added as a party defendant to the proceedings.

On February 2, 1971, Petitioners filed a Motion for Declaration of Class Action. The Motion was granted by the Court on June 4, 1971.

On February 8, 1971, the City of Detroit filed a Motion for Leave to Intervene as a party plaintiff. Intervention was allowed by the Court on July 8, 1971.

On February 9, 1971, the Board of Governors of Wayne State University filed a Motion for Leave to Intervene as a party plaintiff. Intervention was allowed by the Court on July 8, 1971.

On May 1, 1971, Michigan Attorney General Frank J. Kelley filed a Notice of Intervention as a party plaintiff. Such intervention was opposed by Respondent Edison on the ground that the Attorney General was already representing Respondent Michigan Public Service Commission, the defendant in the Circuit Court and, therefore, was in a direct conflict of interest situation. On July 9, 1971, the Ingham Circuit Court permitted the Attorney General to Intervene as a party plaintiff.

On August 24, 1971, the County of Wayne, Michigan, filed an appearance as a plaintiff in the proceedings.

On September 11, 1971, Respondent Edison filed its Application for Leave to Appeal to the Michigan Court of

Appeals from the Ingham Circuit Court's order permitting intervention as a party plaintiff of the Attorney General. On October 11, 1971, the Court of Appeals denied Respondent Edison's application on the ground it failed to show need for immediate appellate review.

On February 4, 1972, Petitioners herein filed a motion seeking a summary judgment declaring the September 21, 1970, order of the Commission null and void and ordering a full refund and repayment of the steam rate increase collected thereunder.

On April 11, 1973, the Court granted the motion, in part, finding that the Commission had failed to provide certain petitioners with adequate notice of the application and hearing. The Court held that the Commission notice sent solely to the City to Detroit failed to satisfy either the requirements of MCLA 460.6a or of fundamental due process, as guaranteed by the United States and Michigan Constitutions. The Court then remanded the matter to the Michigan Public Service Commission for the purpose of giving adequate notice to individual users of steam heat and for a new hearing on the rates.

On April 26, 1973, Petitioners herein filed a motion for rehearing entitled "Motion for Supplemental Order" requesting that the Court (a) prohibit the collection of any further steam rate increases provided for in the Commission's order of September 21, 1970, and (b) order The Detroit Edison Company to refund all sums collected pursuant to the Commission order.

On July 19, 1973, the Court heard arguments of the parties and subsequently received extensive briefs, including a reply brief and a supplemental brief, from the parties.

On October 23, 1973, petitioners herein filed a Motion for Prompt Decision on their pending Motion for Supplemental Order which was noticed for hearing *by Petitioners* on January 11, 1974. On January 11, 1974, the Court issued its Order Denying the Motion for Supplemental Order but the Court did order respondent Edison to post a $10,000,000 bond in order to insure a refund to petitioners if, on hearing before the Commission regarding the substantive reasonableness of the rates, such refund was found to be proper. On January 28, 1974, respondent Edison filed said bond.

On January 30, 1974, Petitioners herein filed their Claim of Appeal to the Michigan Court of Appeals. On February 14, 1974, Respondent Edison filed its Motion to Dismiss Petitioner's Claim of Appeal. On May 9, 1974, the Court of Appeals dismissed the Claim of Appeal on the ground that the Circuit Court order appealed from did not constitute a final judgment under Michigan law.

On March 6, 1974, Petitioners herein filed their Application for Leave to Appeal to the Michigan Court of Appeals. On April 19, 1974, , the Court of Appeals denied the application on the ground that Petitioners failed to persuade the Court that interlocutory review was necessary.

On or about May 10, 1974 and May 30, 1974 Petitioners herein filed Applications to the Michigan Supreme Court for Leave to Appeal and for Peremptory Order from the aforementioned respective Orders of the Court of Appeals. On July 24, 1974 the applications were denied by the Michigan Supreme Court because Petitioners failed to persuade that court that the questions presented should be reviewed by it.

## ARGUMENT

### I.

### THE COURT LACKS JURISDICTION OF PETITIONERS' APPLICATION UNDER 28 USC § 1257.

Petitioners seek to invoke this Court's jurisdiction under 28 USC § 1257 which provides in pertinent part as follows:

> "§ 1257. State courts; appeal; certiorari
>
> *Final judgments or decrees* rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari. . . ."

However, there has been no final judgment or decree rendered in this case. The Circuit Court for Ingham County in granting Petitioners' motion for partial summary judgment, *remanded* the cause to Respondent Commission for hearings in which those Petitioners who the Court determined had inadequate notice could participate. The Circuit Court clearly retained jurisdiction but expressly ordered that no action be taken as to the issue of the substantive reasonableness of the steam rates until after the new hearing before the Commission pursuant to the remand. (Petitioners' Appendix A-7.) Upon this record, it is clear that there was more to be decided and that there had been no effective determination of the litigation. *Clark* v *Williard*, 292 US 112 (1933); *Market Street Railroad Co* v *Railroad Commission of the State of California*, 324 US 548 (1944), *reh denied*, 324 US 890 (1944). The

requirement of "finality" is not one of those technicalities easily scorned. It is an important factor in the smooth working of our federal system. *Radio Station WOW* v *Johnson,* 326 US 120 (1944).

Nor does this case fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action. *Local No. 438 Construction & General Laborers' Union* v *Curry,* 371 US 542 (1963); *Mills* v *Alabama,* 384 US 214 (1966). Petitioners' claimed right to a refund is inextricably interwoven with the question of whether the challenged rates are reasonable or unreasonable, the precise question which the Circuit Court remanded for new hearings before Respondent Commission. If the rates are found to be reasonable (and there has been no finding to the contrary by any court or administrative tribunal in this case), the refund would operate so as to deprive Respondent Edison of due process in that it would have provided service for which it had not been paid. If the rates are found unreasonable in any particular, petitioners are protected by a bond covering interest as well as the amounts actually paid.

Petitioners' application is premature. The Michigan Court of Appeals expressly noted the lack of finality of the Circuit Court order when it held that Petitioners had failed to persuade it " . . . of the need for immediate appellate review", (Petitioners' Appendix C), and further that the orders " . . . sought to be appealed do not constitute a final judgment", (Petitioners' Appendix D). The Court therefore lacks jurisdiction. To accept this case in its present posture would lead the Court to exercise its jurisdiction in piece-meal proceedings or to render an advisory opinion. *Pope* v *Atlantic Coast Line Railroad Co.,* 345 US 379 (1953.)

## II.

### THE ORDER ENTERED BY RESPONDENT COMMISSION WAS NOT VOID AND A REMAND FOR NEW HEARINGS WAS PROPER.

Petitioners base much of their argument on the claim that the order entered by Respondent Commission was void because of an inadequacy of notice to the ratepayer Petitioners herein.[2]

Petitioners erroneously rely on *Hanson* v *Denckla,* 357 US 235 (1958) and *McDonald* v *Mabee,* 243 US 90 (1917) which are inapposite because they were cases where there was a complete failure of jurisdiction because of lack of effective service of process. In this case there is no question that the Commission had jurisdiction to conduct the hearings held below. The Circuit Judge expressly so held in his opinion below (Petitioners' Appendix A-1, 2;) and Petitioners' claim no error in this finding. Thus, this case presents the situation where an otherwise valid order is *voidable* at the instance of a party who, as the Circuit Court held, did not receive adequate notice. *Armstrong* v *Manzo,* 380 US 545 (1965) and *Roller* v *Holly,* 176 US 398 (1900), cited by Petitioners, clearly indicate that the orders there involved were *voidable,* not void, at the instance of one who was not afforded adequate notice. As the Court noted in *Toy Toy* v *Hopkins,* 212 US 542 (1908):

> "It is rarely that things are wholly void and without force and effect as to all persons and for

[2] It should be noted that no Michigan Appellate Court has yet passed upon Respondents' contention that the rate making activity herein was basically a legislative function and as such there was no constitutional requirement of notice to customers.

all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed."

In any event, the lower court's disposition of the matter was proper. In *Atlantic Coast Line Railroad Company* v *State of Florida*, 295 US 301 (1934), *reh denied* 295 US 769, this Court was presented with a similar argument that the invalidation of an ICC order for failure to include findings of fact required by law requires the immediate refund of rates collected under that order until the defect was cured. The Court held to the contrary, and remanded as here, noting that the remedy requested was one of restitution and stating:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.
>
> The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it." (295 US at 309-310.)
>
> • • •
>
> "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound dis-

cretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip... "'In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.' " (295 US at 310.)

• • •

*"To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings.* The blunders being now corrected, the verities of the transaction are revealed as they were from the beginning. We think the better view is that in the light of its present knowledge, the court will stay its hand and leave the parties where it finds them." (295 US at 314)[3] (emphasis supplied.)

Here, the "blunder," if any was the failure of Respondent Commission to give what the Circuit Court deemed to be adequate notice. The lower court devised a remedy to correct that "blunder" and at the same time preserve the rights of Petitioners and Respondent Edison. See *Weidberg* v *American Airlines, Inc.*, 336 F Supp 407 (N.D. Ill. 1972) where the Court likewise refused to order an immediate refund to a class of plaintiffs who had

[3] It is noteworthy that the Court in *Atlantic Coast Line*, determined that the ICC order was in fact voidable although it referred to it in an earlier decision as void. (295 US at 311.)

been given no notice of a rate making proceeding. The Court found the defect to be procedural in nature and curable by a remand, stating:

> "If a determination of unreasonableness is made, coupled with the Moss court's decision holding the C.A.B.'s order and its fares invalid then there is a basis for finding that the retention by the air carriers of the increase of the fares would violate equity and good conscience. The Act implies that fares should be just and reasonable, as well as not discriminatory, prejudicial or preferential. *If the fares are found to be reasonable, on the other hand, then the only equity on plaintiff's side is the procedural defect committed by the C.A.B.* Since the Act allows reasonable fares and it can not be doubted that the carriers are entitled to a reasonable rate of return, plaintiffs would have a weak case if the fares were reasonable and just." (336 F Supp at 407.) (Emphasis supplied.)

Moreover, in the face of plaintiffs' claim that the C.A.B. order was void *ab initio* (as petitioners claim here), the Court found the order to be voidable, relying on this Court's decision in *Atlantic Coast Line, supra.* (336 F Supp at 411.)

The decision of the Ingham Circuit Court was in accord with this Court's decision in *Atlantic Coast Line, supra,* and *Weidberg, supra.* It also was in accord with applicable Michigan law. *Michigan Consolidated Gas Company* v *Michigan Public Service Commission,* 389 Mich 624. (1973.)

Petitioners however claim that their due process rights were infringed and that is the end of it. They say a refund must be declared. This argument ignores that due process must be accorded Respondent Edison as well and such is not accomplished by awarding Petitioners a windfall because of a claim of inadequate notice of the hearing. If the rate is found to be in fact reasonable, Petitioners have paid the proper amount for a service they have already received. A refund now without any determination that the rates set are in any way substantially unreasonable would clearly deprive Respondent Edison of its property. In *Michigan Consolidated Gas Company* v *Michigan Public Service Commission, supra,* the Circuit Court, upon appeal by the utility, ordered a rate increase over and above that authorized by the Public Service Commission pending a remand to the Commission, even though certain commercial and residential utility customers were affected for the first time in the proceedings by the Court order. The Court required the utility to file a bond in case a refund was required after the new Commission hearings. It is submitted that in that case, as in this case that the purpose of the Court should be to effectuate the true "due process" or fundamental fairness requirement as aptly explained by this Honorable Court:

> "Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is com-

pounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Joint Anti-Fascist Refugee Committee* v *McGrath*, 341 US 123. (1951).

## III.

### THE REMAND DOES NOT WRONGFULLY SHIFT THE BURDEN OF PROOF.

Petitioners, relying on *Armstrong* v *Manzo, supra,* claim that the Circuit Court, in its order to remand, has wrongfully shifted the burden of proof to Petitioners. The record does not bear out this contention. In its order dated January 11, 1974, the Court stated as follows:

> "This Court's Opinion, rendered April 11, 1973, made no determination as to whether the steam rates granted to Detroit Edison by the Michigan Public Service Commission on September 21, 1970, were unreasonable or confiscatory. The only determination made was that proper notice of the application to increase steam rates must be given to those customers of Detroit Edison. The remand to the Public Service Commission was for the purpose of giving the notice required and then having a subsequent hearing as to whether the rates granted in 1970 were excessive or not taking into consideration any evidence that existed at the time of the original rate hearings which any in-

terest party may wish to submit." (Petitioners' Appendix B1, 2.)

The Order clearly envisages a new and complete hearing at which *all parties* must submit evidence, including this Respondent. The order clearly does not shift the burden of proof as claimed. This respondent certainly intends to present evidence through witnesses and to have those witnesses cross examined by those parties who choose to exercise the right.

## CONCLUSION

Respondent The Detroit Edison Company prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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*Attorneys for Respondent*
*The Detroit Edison Company*
By: /s/ Richard Ford
/s/ George Hogg, Jr.
/s/ Francis E. Bentley

SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1974

NO. 74-467

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BUILDING OWNERS & MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, BOOK BUILDING CO., COMFORD INVESTMENT CO., FISCHER NEW-CENTER CO., FORT STREET REALTY CO., GUARDIAN BUILDING CORPORATION, WASHINGTON BOULEVARD BUILDINGS, INC., WILLEMAN INVESTMENT CO.,

On behalf of themselves and all other users of Detroit Edison Company steam heat in the metropolitan Detroit area
CITY OF DETROIT, COUNTY OF WAYNE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN
Petitioners,

vs.

THE DETROIT EDISON COMPANY
and
MICHIGAN PUBLIC SERVICE COMMISSION
Respondents.

---

# REPLY OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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OCTOBER TERM 1974

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BUILDING OWNERS & MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, BOOK BUILDING CO., COMFORD INVESTMENT CO., FISCHER NEW-CENTER CO., FORT STREET REALTY CO., GUARDIAN BUILDING CORPORATION, WASHINGTON BOULEVARD BUILDINGS, INC., WINEMAN INVESTMENT CO.,

On behalf of themselves and all other users of Detroit Edison Company steam heat in the metropolitan Detroit area
CITY OF DETROIT, COUNTY OF WAYNE,
ATTORNEY GENERAL OF THE STATE OF MICHIGAN
Petitioners,

vs.

THE DETROIT EDISON COMPANY
and
MICHIGAN PUBLIC SERVICE COMMISSION
Respondents.

---

## REPLY OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION TO PETITION FOR WRIT OF CERTIORARI

Respondent Michigan Public Service Commission herewith replies in opposition to the Petition for Writ of Certiorari to review the Order of the Supreme Court of the State of Michigan entered on July 24, 1974.

## JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3). Respondent Michigan Public Service Commission denies that the petition states any grounds upon which such jurisdiction may be invoked.

## QUESTION PRESENTED

The Michigan Public Service Commission (Commission) conducted a hearing on a rate application by The Detroit Edison Company (Edison) and subsequently entered an order authorizing Edison to increase its rates which had been in effect for 8 years for steam service which it provides in the Detroit area. Prior to the hearing, notice thereof was given to Edison and to the City of Detroit.

On an appeal from the rate order, the Circuit Court of Ingham County determined that the failure to provide notice to the individual steam users constituted a violation of procedural due process. The Circuit Court ordered Edison to post a bond for $10,000,000 to insure the refund of any execessive steam rates, and it remanded the matter back to the Commission with instructions to reopen the proceedings, give adequate notice thereof to its steam users, take further evidence which might be submitted by the steam users, and to redetermine the steam rates if deemed appropriate.

The Circuit Court expressly retained jurisdiction to review the reasonableness of the steam rates upon conclusion of the remanded proceedings before the Commission and to determine the manner of refunding excessive rates collected by Edison, if any such refund should ultimately be deemed necessary.

The Petitioners appealed a portion of the order of the Circuit Court which denied their motion for immediate refund of the rates collected by Edison under the Commission order.

The question presented is whether there was abuse of discretion by the Supreme Court of the State of Michigan in not granting leave to appeal from a portion of the interlocutory order of the Circuit Court, where that order contained no finding on the ultimate substantive issue of the reasonableness of the steam rates and it remanded the matter back to the Commission to give adequate notice and conduct further proceedings, while providing, during the interim, that Edison post a bond sufficient to assure refund of any excessive steam rates which might be collected by it during the pendency of the new determination by the Commission.

## COUNTER STATEMENT OF THE CASE OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION

The respondent Commission is an agency of the State of Michigan which has been delegated with the responsibility of determining and authorizing fair and reasonable rates for services offered by the public utilities in the State of Michigan.

On May 7, 1970, Edison filed an application with the Commission seeking to increase rates covering the supply of steam to approximately 1,200 steam customers in the downtown and midtown Detroit area (Commission Case No. U-3678). Hearings on the application were held before the Commission on September 1, 3 and 11, 1970. Written notice

of the hearing was sent to the City of Detroit by the Commission pursuant to MCLA §460.6A.

On September 21, 1970, Building Owners & Managers Association of Metropolitan Detroit (BOMA), one of the petitioners herein, filed its delayed petition to intervention and rehearing and its petition was denied by the Commission that day. Also, on September 21, 1970, the Commission issued its order authorizing Edison to increase its steam rates effective on and after September 21, 1970.

On October 19, 1970, petitioner, Building Owners & Managers Association of Metropolitan Detroit (BOMA), along with six private corporations or partnerships that owned or operated buildings that received steam service from Edison, commenced this action in the Circuit Court for Ingham County alleging that the September 21, 1970 Commission order was unlawful and unreasonable because the Commission had failed to provide actual notice to the steam power users, the rate increase was not calculated on a proper rate base, and that the Commission had disregarded the provision of the contracts between Edison and various users of steam power which required a six-month notice of change of rates. On November 13, 1970, Edison was ordered to be added as a party defendant to the proceedings.

On February 2, 1971, petitioners filed a Motion for Declaration of Class Action. The Motion was granted by the Court on June 4, 1971. Later, other petitioners were permitted to intervene.

On February 4, 1972, petitioners filed a motion seeking a summary judgment declaring the September 21, 1970 order of the Commission null and void and ordering a full refund and repayment of the steam rate increase collected thereunder.

On April 11, 1973, the Court granted petitioners' motion in part, finding that the Commission had failed to provide certain petitioners with adequate notice of the application and hearing. The Court then remanded the matter to the Commission for the purpose of giving adequate notice to individual users of steam heat and for the taking of evidence from the parties and possible redetermination of the rates established by the Commission in its September 21, 1970 order.

On April 26, 1973, petitioners filed a motion for rehearing entitled "Motion for Supplemental Order" requesting that the Court (a) prohibit the collection of any further steam rate increases provided for in the Commission's order of September 21, 1970, and (b) order Edison to refund all sums collected pursuant to the Commission order.

On July 19, 1973, the Court heard arguments of the parties and subsequently received extensive briefs, including a reply brief and a supplemental brief, from the parties.

On October 23, 1973, petitioners filed a Motion for Prompt Decision on their pending Motion for Supplemental Order which was noticed for hearing by petitioners on January 11, 1974. On January 11, 1974, the Court issued its Order Denying Petitioner's Motion for Supplemental Order but the Court did order respondent Edison to post a $10,000,000 bond in order to insure a refund to petitioners if, on hearing before the Commission regarding the substantive reasonableness of the rates, such refund was found to be proper. On January 28, 1974, respondent Edison filed said bond.

On January 30, 1974, petitioners filed a Claim of Appeal to the Court of Appeals of the State of Michigan. On May 9, 1974, the Court of Appeals dismissed petitioner's Claim of Appeal.

On May 10, 1974 petitioners filed an Application for Leave to Appeal in the Supreme Court of the State of Michigan. On July 24, 1974 the application for leave to appeal was denied.

## ARGUMENT

### I.

### THE MICHIGAN SUPREME COURT PROPERLY DENIED LEAVE TO APPEAL SINCE THE ORDER OF THE LOWER COURT SPECIFICALLY WITHHELD DISPOSAL OF THE SUBSTANTIVE ISSUE BETWEEN THE PARTIES.

The Circuit Court in its order of remand specifically indicated that it took no position and would conduct no inquiry into the reasonableness of the steam rates authorized by the Commission until after the proceedings on remand had been concluded and the Commission had exercised the opportunity to determine whether the rates should be altered.

Further, consistent with this ruling the Circuit Court utilized a procedure commonly used by a number of regulatory agencies and ordered that Edison post a bond, sufficient in the eyes of the Court, to assure a refund of any rates ultimately deemed excessive. This action by the Court had the dual effect of retaining the status quo of the matter and of guaranteeing the rights of Edison's steam customers.

The action of the Circuit Court is a classical example of an interlocutory decision, being dispositive of none of the substantive issues in the case. The Michigan Supreme

Court in the absence of any statutory provisions has repeatedly frowned on granting appeals on orders of this nature.

In *Garbino* v *Lee C. Miller,* 48 NW 2d 217, 330 Mich 688 (1951), the Michigan Supreme Court, on the basis of prematurity, denied an appeal from an order of reference by a lower court to a circuit court commissioner, stating, at pages 219 & 220, in part as follows:

> "It does not appear in the record on this appeal that the trial judge passed upon any of the controverted issues . . .
>
> "But under the record it was within the discretion of the circuit judge to order reference to the circuit court commissioner 'for an accounting' as to any claim proven by plaintiff. The circuit judge had not finished the hearing of the instant case or rendered a final decision therein before making the order of reference to the circuit court commissioner from which defendants took this appeal. 'Unless otherwise provided by statute, a judgment, decree or order, in order to be appealable as of right, must be a final one.' 7 Callaghan's Michigan Pleading and Practice, § 53.12. In the instant case the order of reference was not a final order.
>
> "Defendants' appeal taken as a matter of right was premature and improperly taken. . . . The relief sought by appellants on this appeal is denied, and the cause remanded for further proceedings therein. . . ."

See also *Wurzer* v *Geraldine,* 256 NW 439, 268 Mich 286 (1934); *Airport Recreation Club* v *Morris,* 286 NW 131,

288 Mich 694 (1939); *Ashford* v *Unemp Comp Comm*, 43 NW 2d 918, 328 Mich 428 (1950).

There is no question that petitioners have no statutory right of appeal of the order of the Circuit Court. There is no question that the Circuit Court recognizes its responsibility to review the ultimate determination of the Commission and that it has explicitly taken steps to preserve the status quo until such time as that review has been concluded. Under the circumstances, denial by the Michigan Supreme Court of leave to appeal was not only consistent with its practice but also consistent with proper procedures for judicial administration.

## II.

## THE PETITIONERS' PREMATURE APPEAL FAILS TO PRESENT A CAUSE OF ACTION UPON WHICH THIS COURT SHOULD EXERCISE ITS JURISDICTION.

As has been repeatedly espoused by this Court, the polestar of federal review has always been "finality", i.e., review of interlocutory actions must await final determination of the cause at the trial level.

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v United States, 309 US 323, 324, 325 (1939).

See Also: *Market Street R Co* v *Railroad Com*, 324 US 548 (1944); *Republic Natural Gas Co* v *Oklahoma*, 334 US 62 (1947); *Cohen* v *Beneficial Industrial Loan Corp*, 337

US 541 (1948); *Di Bella v United States*, 369 US 121 (1961); *cf. Federal Trade Com* v *Minneapolis-Honeywell Regulator Co*, 344 US 206 (1952); *United States* v *F. M. Schaefer Brewing Co*, 356 US 227 (1957).

There is no question here that the order of the Circuit Court is interlocutory in nature and that upon completion of the remand the Circuit Court intends to exercise its jurisdiction of review of the procedures and conclusions of the Commission in regard to its consideration and redetermination of Edison's steam rates. Under the circumstances, it cannot be argued, nor do the Petitioners attempt to do so, that failure of this Court to exercise its jurisdiction, at this stage of the rate proceedings, will deny petitioners their right of review.

Further, there is the prospect that upon completion of the remanded proceeding before the Commission the need for judicial assistance beyond the Circuit Court level may become unnecessary for petitioners. If the Commission should determine that a lower level of rates, or, for that matter, that the previous schedule of rates should be authorized, then the Circuit Court is prepared to oversee the refunding of the excessive amounts collected by Edison pursuant to the present rate order.

Were this Court to grant the petition it would only further delay the completion of proceedings which have been pending for more than four years in the judicial tribunals and further hinder the ultimate ends of justice without having provided for any meaningful relief on the ultimate substantive issue which as yet remains undecided in this matter, i.e., the reasonableness of Edison's rates for its steam service.

## III.

## THE DETERMINATION OF THE CIRCUIT COURT THAT THE RATE ORDER OF THE COMMISSION HAD BEEN ENTERED WITHOUT ADEQUATE NOTICE TO ALL OF THE STEAM USERS WAS NOT SUFFICIENT TO MAKE THAT ORDER IMMEDIATELY VOID AS A DENIAL OF FUNDAMENTAL DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

The Circuit Court remanded the rate proceedings back to the Commission based upon the determination that adequate notice had not been given to Edison's steam users prior to conducting the hearing on the steam rates. In doing so, he characterized his finding of denial of procedural due process as a denial of fundamental due process. It should be pointed out, however, that the Circuit Court looked askance at any utility rate order being issued without full provisions for notice and hearing, even that of a municipally owned and operated utility. In that conclusion the court was wrong.

As has been pointed out by this Court, where a legislative function which requires no notice or hearing is delegated to an administrative agency, failure of that agency to provide notice does not constitute denial of fundamental due process under the Fourteenth Amendment of the Constitution of the United States. In *Bowles B. Willingham,* 321 US 503 (1943) the Court discussed the Fifth and Fourteenth Amendments in connection with certain rent orders issued by the Administrator of the Office of Price Administration without prior notice or hearing to landlords. It concluded that due process had been afforded to the landlords through provision by Congress for judicial review after the orders had been made effective.

In respect to utility rate matters, in *California Pub Utilities Comm* v *United States*, 356 F 2d 236 (1966) cert den 385 US 816 (1966), in a matter involving the Federal Communications Commission, it was pointed out by the United States Court of Appeals, Ninth Circuit at page 241 as follows:

> "Even if they had merit, petitioner's allegations of lack of notice and opportunity to be heard could not raise constitutional questions unless proceeding from a deprivation of property claim. Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. Colorado Interstate Gas Co v. Federal Power Commission, 324 U.S. 581, 589, 65 S. Ct. 829, 89 L. Ed. 1206 (1945). As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right."

The statutory rights of the petitioners have been fully recognized and protected by the action of the Circuit Court and pursuant to its order of remand petitioners will be afforded a full opportunity to be heard in the rate proceedings.

## IV.

## THE ORDER OF REMAND DOES NOT IMPOSE ANY GREATER BURDEN UPON THE PETITIONERS THAN THAT WHICH WOULD HAVE BEEN IMPOSED UPON THEM IN THE ORIGINAL HEARING.

As pointed out previously, utility rate making is a legislative function. It is a determination by the Commission of the fair and reasonable rates that should be charged based upon the evidence. If the petitioners and other steam users of Edison had appeared and participated in the original hearing, they would have had opportunity to examine the witnesses and evidence submitted therein and to present whatever additional or counter proofs they deemed essential to the decision-making process. The order of remand of the Circuit Court provides exactly the same opportunities. The Commission interprets the order of remand to require the Commission to grant the petitioners and other steam users every opportunity available in the original rate hearing.

Pragmatically, the Commission considers this to be, in effect, a new hearing on the issue of reasonable steam rates to be authorized to Edison, irrespective of how it is characterized. The determination and authorization of utility rates is an ongoing function of the Commission and the procedure for accomplishing this function will be followed on the remand just as it was in the original proceeding.

Therefore, there is no shifting in the burden of proof that will result from the order of remand of the Circuit Court.

## CONCLUSION

The Petition for Writ of Certiorari has failed to state any grounds upon which the Court may exercise its jurisdiction and therefore the Respondent Michigan Public Service Commission prays that it be denied.

Respectfully submitted,
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